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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICO RAMONE YOUNGBLOOD et al., Defendants and Appellants.	A150429 (Sonoma County Super. Ct. No. SCR679689)

This criminal prosecution arises from a neighborhood altercation that involved the two codefendants, Rico Ramone Youngblood and Sergio Arteaga, and the family of a rival gang member. Defendants were convicted of various assault and gang-related offenses. On appeal, Youngblood challenges certain testimony by the prosecution's gang expert and contends there was insufficient evidence to support the gang allegations used to enhance his sentence under Penal Code[1] section 186.22, subdivision (b). Arteaga seeks to overturn his sentence on several grounds, including his entitlement to resentencing under recent legislative amendments to sections 667 and 1385. (See Stats. 2018, ch. 1013, Sen. Bill No. 1393.) Both appellants argue that certain fines and assessments should not have been imposed without a hearing regarding their ability to pay.

We affirm the convictions of Youngblood and Arteaga and reject as forfeited their challenge to the imposition of court fines and assessments. However, we agree with

[1] All statutory references are to the Penal Code unless otherwise specified.

Arteaga that a remand in his case is necessary to allow the trial court to exercise its discretion whether to strike his five-year prior serious felony enhancement in light of Senate Bill No. 1393. Remand will allow the trial court to address other sentencing errors identified herein.

I. BACKGROUND

In April 2016, S.F., Sr. (Senior) lived on Pomo Trail in Santa Rosa with his wife (Mother), two daughters, and his teenaged son, S.F., Jr. (Junior).[2] Senior's niece (Niece) lived in a separate unit towards the back of the property. Arteaga lived across the street. On the evening of April 6, 2016, Junior and Niece were outside talking. Senior and Mother heard yelling and swearing on the street and went outside to investigate. They discovered Arteaga, Youngblood, and Junior having a verbal exchange. Mother grabbed Junior and told everyone to calm down. Senior walked towards the men in the street, at which point Arteaga "came at" Senior, throwing punches at him. Senior dodged the punches and the situation deescalated. Everyone withdrew to their respective homes.

Ten to fifteen minutes later, appellants returned to Senior's residence, yelling and rattling their fence. Arteaga stood on a truck peering over the fence. Mother told appellants to calm down and go home or they would call the police. Arteaga called Mother a "stupid old lady" and taunted her, stating she "thought her sons were real saints." Arteaga began to push on the gate in the fence. Mother opened the gate to tell Arteaga to go away, and Arteaga pushed Mother to one side and attacked Senior, throwing punches at Senior's face. Several of these blows connected, and Senior's face began to swell and his lip was swelling and bleeding. To defend himself, Senior grabbed Arteaga around the neck and the two men struggled. Arteaga attempted to hit Senior several more times but his punches could not connect because of Senior's grasp. Youngblood joined in the assault, hitting Senior with a metal cane on his back, head, and elbow at least three times. Mother wrested the cane away from Youngblood. Appellants left off their attack and returned to Arteaga's house.

[2] We refer to the family in general terms to protect their privacy in this matter.

Senior returned to his residence. He did not call the police but he later spoke to an officer who arrived at the scene. Senior recalled telling the officer he did not want to press charges because he "didn't want any problems" and appellants were gang members. Following the altercation, Senior's head, mouth, elbow, and back were hurt. He had headaches and was dizzy for 15 to 20 days after the attack. He did not seek medical treatment because his head was not bleeding, it was just "really, really red," and he was uninsured and earned very little. When the responding officers arrived on the scene after 12:30 a.m., Mother approached the police vehicle shaking and her voice trembling. The officer took pictures of Senior's injuries and Mother gave him the cane Youngblood used in the assault and a red T-shirt that Arteaga had removed during the fight.

As a result of this altercation, the Sonoma County District Attorney filed a third amended information charging both Youngblood and Arteaga with assault with a deadly weapon, a metal cane (§ 245, subd. (a)(1) (count 1)); assault by means of force likely to produce great bodily injury (*id.*, subd. (a)(4) (count 2)); assault and battery for the benefit of a criminal street gang (§§ 242, 186.22, subd. (d) (count 3)); and street terrorism (§ 186.22, subd. (a) (count 4)). The information alleged counts one and two were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(B)). It further alleged Arteaga had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious or violent felony conviction (§ 667, subd. (a)(1)), and that both Youngblood and Arteaga had served prior prison terms (§ 667.5, subd. (b)).

Jury trial commenced on October 31, 2016. Senior and Mother testified with respect to the specifics of the assault incident. Several law enforcement officers testified regarding their prior gang-related contacts with both appellants. Officer Brian Sinigiani testified that, as a member of the Santa Rosa gang enforcement team, he interviewed Youngblood when Youngblood registered as a gang member in September 2010. Youngblood admitted his affiliation with the Norteño criminal street gang and also acknowledged an Indian Pride association. Sinigiani photographed Youngblood's gang tattoos, including the letters "P" and "L" tattooed on the back of his arms. In April 2015, Santa Rosa Police Officer Kaiden Kemp reviewed Target surveillance footage and

confirmed Youngblood had large "P" and "L" tattoos on the back of his arms in the triceps area. In December 2013, Santa Rosa Police Officer Jessie Ludikhuize stopped a car driven by Youngblood. Alexander Vargas was a passenger. Another officer, John Cregan, testified that Alexander Vargas admitted to him in 2011 that he was associated with the Norteño criminal street gang.

Santa Rosa Police Officer Michael Spediacci testified he stopped a car driven by Arteaga in August 2013. All three occupants of the vehicle sported tattoos. One passenger had the letters "P" and "L" tattooed on the inside of his forearms and the words "West Steele" across his wrist. Another passenger, Arteaga's cousin, had an M16 machine-gun-style tattoo with three dots below it on the inside of his left biceps. Arteaga had a "large linear vertical tattoo" over his left eye, four dots on his left hand, and the letters "SF" behind his right ear. A red 49ers hat was placed behind the back seats, showing through the rear window of the vehicle. When Officer Spediacci asked Arteaga if he was in good standing with a criminal street gang, Arteaga replied in the affirmative. Detective Barrett Klein testified that in April 2014, he made contact with Arteaga, who was alone in a vehicle. Arteaga was wearing a black baseball cap with the letter "P" on it, had a 49ers lanyard hanging from the rearview mirror, and possessed what Klein identified as Norteño rap music on his iPod. When Klein asked Arteaga if he was from a "specific Norteño subset" known as "PL," Arteaga said yes. Santa Rosa Police Officer Michael Mieger testified that he arrested Arteaga in August 2013 for driving under the influence. When asked whether there was anyone who would take responsibility for him, Arteaga identified Youngblood and was released into Youngblood's custody.

Santa Rosa Police Detective James Vickers testified as the gang expert in the case. Based on his training and experience, Vickers testified generally concerning the gang culture of the two most prevalent gangs in Santa Rosa, the Norteños and the Sureños. He explained that gang members use tattoos to identify themselves as affiliated with the gang. As an example, a Norteño tattoo of "SF" means "scrap-free," scrap being a derogatory term for a Sureño. "PL" tattoos were also specific to Norteños. According to Vickers, any time a gang member is shirtless and displays his tattoos, he wants his gang

membership to be known. This signals to members of a community that, even if the perpetrators of a particular crime are caught, other gang participants can retaliate. On this basis, witnesses become "extremely scared" and may "flat out refuse" to cooperate with police.

Vickers opined, based on his training, experience, and the facts admitted into evidence in this case, that both Youngblood and Arteaga were active participants in the Norteño criminal street gang. In particular, Vickers testified that Youngblood was associated with the Pachuco Locos, a subset of the Norteños which claims the Pomo Trail area in Santa Rosa as their turf. Based on his training, personal experience, and certain photographic evidence admitted at trial, Vickers opined that Junior was an active participant in the Sureño criminal street gang. The photographs, which had been posted on Facebook, showed Junior and other individuals with Junior making Sureño hand gestures, sometimes in front of a street sign or other recognizable location. Vickers opined that posting such photographs signaled to fellow gang members that the poster was actively representing the gang and identified claimed territory to rival gang members.

According to Vickers, the fact that an altercation between a Norteño and a Sureño happened on a street claimed as Norteño territory held "huge significance." "If you have one—or someone that—that you believe is a rival living on your street, that is something that's not acceptable." Vickers had personally seen a situation where a gang member lived in a rival gang's territory and was subjected to constant harassment over the course of years until the family decided to move.

Responding to a hypothetical question in which an active Norteño became involved in an altercation with a Sureño affiliate, and the father of the Sureño (who was not, himself, a gang member) intervened, Vickers opined the father's intervention would be seen as a sign of disrespect by the Norteño, who would be required to "do something" to the father. Vickers elaborated that if the Norteño was having a difficult time with the father and a second Norteño was present, that backup gang member would be required to become involved in the fight for two reasons: "(1) because he ha[d] another gang

member with him who's in a struggle, and (2) he ha[d] another gang member there that [was] gonna report back on whether or not he intervened or he helped." Finally, when presented with a hypothetical scenario in which an assault was committed "by two people who had prior contacts with the Norteño criminal street gang while one of them was wearing a red shirt and a red hat, another one of them was wearing red shorts and had been in a verbal altercation with a Sureño gang affiliate," Vickers opined he would view the crime as having been conducted for the benefit of, or in association with, the Norteño criminal street gang.

On November 14, 2016, the jury convicted Youngblood on all counts and found all related enhancements true. Arteaga was convicted on counts 2, 3, and 4. On count 1, Arteaga was found guilty of simple assault, a lesser included offense. Arteaga's gang enhancement allegations were dismissed after the jury did not reach a verdict. At a bifurcated hearing on December 2, 2016, the trial court found true the allegations of the strike prior, prior serious felony conviction, and prison priors.

On January 6, 2017, the trial court sentenced Youngblood to an aggregate term of nine years in prison consisting of three years for count 1, five years on the related gang enhancement, and an additional year to be served consecutively for the prison prior. Sentences with respect to counts 2, 3, and 4 were imposed but stayed pursuant to section 654. Arteaga was sentenced to an aggregate prison term of 10 years, consisting of two years for count 2 doubled to four years based on a prior strike, and consecutive terms of five years for the prior serious felony and one year for the prison prior. A term of 32 months was imposed with respect to count 4, to run concurrently. Appellants' timely notices of appeal now bring the matter before this court.

II. ISSUES RAISED BY YOUNGBLOOD

A. *Alleged* Sanchez *Error*

Youngblood challenges certain testimony offered by Vickers, the gang expert in this case, as inadmissible case-specific hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Youngblood objects to two portions of Vickers's testimony:

(1) his assertion that the Pomo Trail area where the assault occurred was the territory of the Pachuco Locos, a subset of the Norteño criminal street gang, and (2) his claim that a Norteño "code of honor" requires Pachuco Locos members to retaliate with violence when disrespected. Youngblood also contends the Norteño "code of honor" testimony was speculative and an improper basis for expert opinion. We find no error.

In *Sanchez*, the California Supreme Court, disapproving prior case law to the contrary, adopted the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Sanchez, supra*, 63 Cal.4th at p. 686 & fn. 13.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) Such statements may not be related by an expert as true "unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.)

On the other hand, the *Sanchez* court reaffirmed that an expert may "testify about more generalized information to help jurors understand the significance of those case-specific facts" and may "give an opinion about what those facts may mean." (*Sanchez, supra*, 63 Cal.4th at p. 676.) Such background testimony "has never been subject to exclusion as hearsay, even though offered for its truth." (*Id.* at p. 685.) Our high court gave several examples of the distinction between generalized and case-specific information, one of which pertains directly to gang expert testimony: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to

give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Id.* at p. 677.)

Under Evidence Code section 802, a witness testifying in the form of an opinion generally "may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based." Indeed, an expert is entitled to explain to the jury the "matter" upon which he or she relied "even if that matter would ordinarily be inadmissible." (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) Thus, as *Sanchez* explains, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) This is exactly what Vickers did in this case.

With respect to the Pomo Trail area where the instant assault took place, Vickers testified he had personally spoken with suspected gang members about the importance of turf and explained: "[G]enerally a neighborhood for a gang or a specific area is part of the identity. So while in this case we have the Pachuco Locos, which are a subset of the Norteño Criminal Street Gang, they are specific to the Pomo Trail area, that is where they began and that is the area in which that represents them." Based on his training and experience, Vickers testified that the Pomo Trail was an area "frequented by Norteño gang members." He had personally visited the Pomo Trail area approximately 15 times and had spoken to more than 10 individuals under various circumstances, including "proactive patrol work, driving through the area, trying to get a sense for the community, maybe doing traffic enforcement, maybe responding to loud music." While on patrol, he noticed individuals wearing an abundance of red and exposing tattoos identified with a Norteño affiliation. His opinion that Pomo Trail is a Norteño area was also "based on conversations [he] had with other gang detectives and through incidences and other cases that [he had] reviewed."

This testimony was entirely proper as background information concerning the general operations and territory of the Pachuco Locos. *Sanchez* makes clear an expert

may still rely on "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory," which is relevant to the "gang's history and general operations." (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) In *Sanchez*, the Supreme Court found "background testimony about general gang behavior or descriptions of the Delhi gang's conduct and its territory" to be "relevant and admissible evidence as to the Delhi gang's history and general operations." (*Id.* at p. 698.) Other courts—including this one—have reached a similar conclusion. (See *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247 ["expert testimony regarding the general attributes of the Inglewood 13 gang, such as the gang's culture, the importance placed on reputation and guns, the requirements to join or leave the gang, the gang's rivals and claimed turf, the use of monikers and identifying symbols, and the like, were permissible as expert background testimony"]; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 410–411 (*Vega-Robles*) [expert testimony about a gang's "history, territory, insignia, and primary activities" permissible under *Sanchez* as background testimony]; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175 (*Meraz*) [under *Sanchez*, a gang expert may testify "to non-case-specific general background information about [the gang], its rivalry with [another gang], its primary activities, and its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers"].)

Youngblood contends the gang expert's description of the Pomo Trail as Norteño territory was case-specific hearsay because he relied on this fact to offer an opinion, in response to a hypothetical question, that the instant assault was a gang-related crime. Not so. "An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts." (*Sanchez*, *supra*, 63 Cal.4th at p. 676–677.) Vickers was permitted to rely on his specialized knowledge of the Pomo Trail as Norteño territory to conclude, based on case-specific facts presented in a hypothetical and

properly admitted at trial, that the hypothetical assault was gang-related. Reliance on his general knowledge did not convert his statements into case-specific testimony.

Furthermore, Vickers was allowed to explain to the jury the "matter" upon which he relied in offering his expert opinion, "even if that matter would ordinarily be inadmissible," so long as he did so in general terms. (*Sanchez, supra,* 63 Cal.4th at pp. 679, 686.) In *Vega-Robles*, we concluded that a gang expert's general background testimony, including testimony about gang territory he had gleaned from hours of formal and informal training, numerous interviews with gang members, prior investigations, and other gang officers, was admissible. (*Vega-Robles*, *supra*, 9 Cal.App.5th at pp. 410–411; see *Meraz*, *supra*, 6 Cal.App.5th at p. 1175 [background information permissible where the expert "described the sources of his background information . . . in only the most general terms" and "conveyed no specific statements by anyone with whom he spoke"].) Similarly here, Vickers testified generally that he had relied on his training, personal experience visiting the Pomo Trail area, conversations with suspected gang members and gang detectives, and review of other investigations, to form his opinion that the Pomo Trail area was Pachuco Locos territory. He did not convey any hearsay statements or reveal the contents of any specific admissions or the particular identities of those with whom he spoke.

Youngblood also finds fault with the gang expert's testimony that a Norteño "code of honor" requires violent retaliation when a gang member perceives he is being disrespected. Youngblood contends such testimony is baseless conjecture or improper case-specific hearsay. Neither contention is persuasive.

The "code of honor" testimony arose in the context of Vickers's explanation of the way gangs exert control in a community by instilling fear through acts of intimidation and violence. He explained: "Respect or fear and intimidation is what enables the gangs to operate." Respect is gained through violence and intimidation, and respect is lost by allowing rival gang members to disrespect you. For example, gang members will

sometimes go into rival neighborhoods wearing gang colors, throw up gang signs, take a picture, and post it on Facebook. This is considered a challenge. Such signs of disrespect would oftentimes be met with violent retaliation. Indeed, in Vickers's experience, "any sign of disrespect or any act of violence precipitated another act of violence."

Vickers also testified that a gang member will take another gang participant along when committing a crime for two reasons: to act as a witness "to testify to the rest of the gang that you were out there representing your gang and putting in your work" and to "make sure you're successful and then communicate your success to the rest of the gang." Moreover, it is an "absolute expectation" that Norteño gang members must back each other up in an altercation, and a gang member who has failed to do so would "receive discipline." Based on his personal experience, Vickers testified: "Generally speaking, if the Norteño is—is losing or is not predominately winning, I have seen other Norteños involve themselves in that altercation to make sure that they win. And I have very rarely ever seen someone not intervene, and when they didn't, I've seen consequences on the other end."

An expert may offer opinion testimony if the subject is sufficiently beyond common experience so that such testimony would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Ochoa* (2001) 26 Cal.4th 398, 438, abrogated on an unrelated point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) Expert testimony "concerning the culture, habits, and psychology of gangs" meets this criterion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Such testimony may include "motivation for a particular crime, generally retaliation or intimidation," as well as "whether and how a crime was committed to benefit or promote a gang." (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657 (*Killebrew*) [listing cases], overruled on another ground by *People v. Vang* (2011) 52 Cal.4th 1038, 1047–1048, fn. 3 (*Vang*).) Far from resting on conjecture, we conclude Vickers's testimony was grounded in his specialized knowledge

and personal experience of gang culture in Sonoma County, properly admissible as relevant background information.[3]

Youngblood also maintains that testimony about a "Norteño honor code" was case-specific hearsay offered for the truth. Responding to a hypothetical about a retaliatory assault involving two Norteño gang members and a Sureño gang member, and other factors that mirrored case-specific evidence, Vickers concluded the hypothetical assault bore the signs of a crime committed for the benefit of a street gang. He explained, "[A]n altercation between a Norteño and a Sureño cannot be unresolved. It cannot go—it cannot go unchecked. . . . [I]t is going to be reported back whatever the—the resolution of that is, be it—be it the—whoever wins and whoever loses; and that's going to be reported back to both sets." When asked what would happen if, in that same hypothetical, a non-gang member third party intervened, Vickers testified that intervention by a "civilian" "cannot go unchecked" either—it would represent a challenge to the Norteño influence in the area which, based on his training, "is not something that is allowed." Vickers testified it diminished the gang's ability to spread fear and intimidation if it did not respond in a situation like this with violence.

None of this testimony is improper case-specific hearsay under *Sanchez.* "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven." (*Sanchez*, *supra*, 63 Cal.4th at p. 685; see *id.* at p. 684 [evidence may be admitted through an applicable hearsay exception or appropriate witness "and the expert may assume its truth in a

[3] Youngblood's assertion the challenged testimony was improper because Vickers did not testify this "rule of honor" is applicable in every situation or is "based on a prescribed script of retaliation for slights from which no member ever dare deviate" would at most go to the weight of the evidence, not to its admissibility.

properly worded hypothetical question in the traditional manner"].) Vickers offered expert opinions, in response to properly worded hypotheticals, which relied on the application of his personal experience and expertise to case-specific facts that were otherwise proven at trial. That the hypotheticals tracked the circumstances of the instant crime "in a manner that was only thinly disguised" did not make Vickers's testimony improperly case-specific. (See *Vang*, *supra*, 52 Cal.4th at p. 1041.) On the contrary, a proper hypothetical " 'must be rooted in facts shown by the evidence' " (*id.* at p. 1045), and the questioner need not disguise that fact (*id.* at p. 1041.) Youngblood has failed to identify any state evidentiary error, pursuant to *Sanchez* or otherwise, based on Vickers's expert testimony.

We may quickly dispose of Youngblood's bare assertion that the gang expert testimony was also a confrontation clause violation, an argument he fails to develop in his opening brief. Testimony of a gang expert may, under certain circumstances, run afoul of the Sixth Amendment's confrontation clause. (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) But Youngblood's brief contains no analysis as to this claim and under the circumstances, we deem the issue forfeited. (See *People v. Williams* (1997) 16 Cal.4th 153, 206 ["[p]oints 'perfunctorily asserted without argument in support' are not properly raised"].)

B. Sufficiency of the Evidence to Support the Gang Enhancements

Youngblood asserts the evidence properly admitted at trial was insufficient to support the gang enhancements attached to his convictions pursuant to section 186.22, subdivision (b)(1).[4] In particular, he argues there was no admissible evidence supporting Vickers's expert opinion that a hypothetical altercation tracking the circumstances here

[4] Section 186.22, subdivision (b)(1), authorizes a sentencing enhancement for persons who commit felonies "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

would have been "committed for the benefit of, at the direction of, or in association with any criminal street gang," specifically the Norteños. (§ 186.22, subd. (b)(1).) Youngblood's sufficiency claim relies heavily on the success of the *Sanchez* arguments we have previously addressed and rejected.

Whether the prosecution has presented sufficient evidence to support a gang enhancement under section 186.22, subdivision (b)(1) is a question of fact we review for substantial evidence. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1366.) Specifically, "[w]hen applying the substantial evidence standard, 'the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Ibid.*)

A felony may be committed "for the benefit of . . . a criminal street gang" when done to promote respect for or instill fear in the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619 [violent assault was committed for the benefit of a street gang because gangs rely on such assaults "to frighten the residents of an area" where they operate], disapproved on other grounds by *Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 [shooting benefitted gang by promoting fear and respect].) Moreover, committing a crime with a known gang member generally satisfies the "in association with" element of the statute. (See *People v. Albillar* (2010) 51 Cal.4th 47, 61–62 [substantial evidence existed that "defendants came together *as gang members* to attack" the victim and thus "committed crimes in association with the gang" where their common gang membership ensured they could rely on each other's cooperation in committing the crimes and they benefitted from committing them together]; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["jury could reasonably infer the requisite association from the very fact that defendant committed the

charged crimes in association with fellow gang members" absent evidence the gang members were "on a frolic and detour unrelated to the gang"].) Finally, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, at p. 68.)

We conclude the record supports a finding that Youngblood's assault on Senior was committed to promote fear and respect for the Norteño street gang and to assist the criminal conduct of a fellow gang member. Testimony and evidence from law enforcement officers established that appellants had active ties to the Norteño street gang and that Junior was an affiliate in the rival Sureño street gang. The jury heard evidence that after the initial exchange and de-escalation, appellants returned to the family's home, wearing gang colors and shouting and rattling the fence. One may reasonably infer from the evidence that appellants' actions were calculated to intimidate and scare the family and provoke a further violent confrontation. Sure enough, Arteaga attacked Senior in an unprovoked assault, at one point removing his shirt to display his gang tattoos. Youngblood joined in the assault when it appeared that Arteaga was losing the fight with Senior, hitting Senior with a metal cane on his back, head, and elbow at least three times. After the incident the family was frightened and reluctant to involve the police. Even without the challenged testimony from the gang expert, the record provides ample basis from which the jury could reasonably find that the assault was gang-motivated. Appellants targeted a rival gang member's family and used violence, intimidation and overt displays of their own gang affiliation to spread fear of their gang and commit crimes in which they relied on their gang membership for cooperation and mutual benefit.

Additional expert testimony only amplified this evidence. By drawing on his specialized knowledge and experience, Vickers was able to explain the significance of such an attack in a neighborhood claimed by the Norteño street gang, the imperative of a

fellow gang member backing up their partner in a losing altercation, and the Norteño gang culture which requires that any sign of disrespect or challenge be met with violence.[5] As we have already concluded, the expert testimony Youngblood challenges was entirely appropriate under *Sanchez*, was not based on speculation or conjecture, and was properly admissible as general background knowledge regarding gang culture. In sum, substantial evidence supports the jury's gang enhancement findings.

III. ISSUES RAISED BY ARTEAGA

A. Denial of Romero *Motion*

Arteaga claims the trial court abused its discretion in denying his motion to dismiss a prior strike allegation for purposes of sentencing under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Section 1385, subdivision (a), permits a trial court to strike a prior felony conviction used to enhance a sentence under the Three Strikes law "in furtherance of justice." (See *Romero*, at pp. 529–530.) When deciding whether to grant or deny a *Romero* motion, the trial court must " 'consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or

[5] Youngblood challenges much of this testimony, arguing that when *Killibrew*, *Sanchez*, and *Vang* are read together, experts should not be permitted to give opinions about what particular gang members are thinking in particular situations. We disagree. *Vang* expressly overruled *Killebrew* to the extent it applied to hypothetical questions regarding hypothetical persons. (*Vang*, *supra*, 52 Cal.4th at p. 1047–1048, fn. 3 ["We disapprove of any interpretation of *Killebrew* . . . as barring, or even limiting, the use of hypothetical questions. Even if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper."]; see *People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 ["Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons."].) Here, Vickers testified about the likely motivations of hypothetical gang members, not about Youngblood and Arteaga.

more serious and/or violent felonies.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*), quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. . . ." ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376–377.) Where, as here, the trial court exercises its discretion to *deny* a *Romero* motion, abuse will be found only in "limited circumstances." (*Carmony,* at p. 378.)

The trial court below indicated it had received Arteaga's sentencing memorandum—which included not only his *Romero* motion, but also his requests to reduce his current offenses to misdemeanors pursuant to section 17, subdivision (b), to strike his prison prior, and to admit him to probation—as well as the prosecution's statement in aggravation and various supplemental documents. After hearing a statement from Arteaga and argument from defense counsel, the trial court stated it could not "in good conscience" find the "unusual circumstances" in this case necessary to grant a *Romero* motion. In particular, the court reasoned: "He has been out of custody for only four years and during that period of time has continued to offend, even while being supervised, has offended repeatedly. The nature and the circumstances of this present felony are so close to the conviction that he suffered in the prior strike, being that there was an attack on another individual, that there were other people there, he was with somebody else while this happened, is just almost exactly the same type of circumstances. [¶] And so when the Court grants a *Romero,* which I take very seriously in granting, what I'm anticipating is that I've seen some long period of time where

someone has already demonstrated to me that they are not in that same place anymore, that they've made life changes, that things have gone more positively for them and so they really fall outside the spirit [of the Three Strikes law] in that way. For Mr. Arteaga, that just has not happened." Far from arbitrary, the trial court's exercise of discretion in this matter appears well grounded in both fact and law.

Arteaga argues the trial court's exercise of discretion was in error because the court relied on an "impermissible factor" in reaching its *Romero* decision—the fact that Arteaga exercised his constitutional right to stand trial instead of accepting a plea bargain. In support of this claim, Arteaga cites certain comments made by the trial court during sentencing indicating that, in assessing sincerity, the court looks at whether a defendant takes responsibility earlier rather than when he is "motivated by the amount of time that's currently before him." The trial court, however, expressly stated: "So I am not—just to be very clear, I am not penalizing him for going to trial." It then indicated, "That's a very minor piece in what the Court is looking at in—in determining whether or not he's eligible for probation or not and whether this is an aggravated, mitigated, or mid term. I already said, quite frankly, I don't think it's an aggravated case; but I also don't believe that it's a probation case just based on his history alone."

It is true a trial court that treats a defendant more harshly for exercising his or her right to a jury trial violates that defendant's due process rights. (*In re Lewallen* (1979) 23 Cal.3d 274, 278; *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 761–762.) However, "[a]lthough a court may not impose a harsher sentence on a defendant as punishment for exercising his or her jury trial right, '[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right.' " (*Ghebretensae*, at p. 762.) No such showing is made by appellant.

The trial court specifically stated it was *not* penalizing Arteaga for going to trial and grounded its decision to deny the *Romero* motion on entirely appropriate reasons related to Arteaga's history of reoffending. More importantly, the court's statements regarding the lateness of Arteaga's acceptance of responsibility appear to be connected to

its denial of probation, a decision in which a defendant's remorse is directly relevant. (See Cal. Rules of Court, rule 4.414(b)(7).) The record does not indicate that the court's statements played any role in its earlier *Romero* denial, which the court considered first and resolved prior to moving on to other sentencing decisions. Absent affirmative evidence to the contrary, we assume the trial court followed the law in denying *Romero* relief.

Arteaga's other two arguments fail for similar reasons. Citing *People v. Garcia* (1999) 20 Cal.4th 490, Arteaga asserts the trial court ignored a crucial factor in making its *Romero* decision—the length of the sentence otherwise imposed, which should have been its "overarching consideration." (*Garcia*, at p. 500 [a defendant's sentence is "the overarching consideration" when deciding whether to strike a prior conviction allegation "because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences"].) Arteaga also argues the trial court failed to weigh all relevant sentencing factors as mandated by *Romero* and *Williams*, ignoring many significant factors in mitigation. However, the length of Arteaga's potential sentence and all of these potentially mitigating factors were clearly before the trial court, as it had the benefit of Arteaga's sentencing memorandum, the prosecution's statement in aggravation, and counsel's arguments at the sentencing hearing. The trial court's failure to specifically refer to those matters in denying the *Romero* motion is not determinative because on a silent record, we assume the trial court followed the law. (*Carmony*, *supra*, 33 Cal.4th at p. 378; *People v. Myers* (1999) 69 Cal.App.4th 305, 310; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) As the *Myers* court held under similar circumstances: "[T]he fact that the court focused its explanatory comments on [one aspect] of appellant's crimes does not mean that it considered only that factor." (*Myers*, at p. 310.) Arteaga has failed to demonstrate any abuse of discretion.

B. Prior Serious Felony Enhancement (§ 667, subd. (a))

At the time of Arteaga's sentencing, the trial court did not have discretion under section 1385 to strike a prior serious felony enhancement imposed pursuant to section 667, subdivision (a)(1). (Pen. Code, former § 1385, subd. (b); Stats. 2014, ch. 137, § 1,

eff. Jan. 1, 2015 ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."].) On September 30, 2018, Senate Bill No. 1393 was signed into law, amending section 1385, subdivision (b), and section 667, subdivision (a), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction at sentencing. (See Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of [a] 5-year enhancement."].) The changes instituted by Senate Bill No. 1393 became effective January 1, 2019, and apply retroactively to nonfinal cases. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973). Arteaga contends that because his case is not yet final, his matter should be remanded for resentencing.

The Attorney General agrees that Senate Bill No. 1393 applies retroactively to Arteaga but argues that remand is "unwarranted because the trial court's statements at sentencing clearly indicated that it would not have dismissed the enhancement in any event." When the record discloses that the trial court proceeded with sentencing on the assumption it lacked discretion, remand is necessary for a trial court to exercise its sentencing discretion in the first instance. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) In limited circumstances, however, remand is not required when "the record shows that the trial court *clearly indicated* when it originally sentenced the defendant that it would not in any event have stricken [the] enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, italics added [articulating standard for declining to remand in analogous context of Sen. Bill No. 620 resentencing].)

The Attorney General points to the trial court's decision below to deny appellant's *Romero* motion and the court's statements concerning his history of reoffending. But the trial court also emphasized several times that this was not an aggravated case. And despite the prosecution requesting imposition of the aggravated term, the trial court sentenced Arteaga to the mitigated term, citing the many mitigating factors that had been advanced by Arteaga's trial counsel. Under such circumstances, we believe the record

contains sufficient ambiguity to justify remand for resentencing in light of the passage of Senate Bill No. 1393.

C. Other Sentencing Issues

Arteaga's other two sentencing complaints are well taken. Indeed, the Attorney General concedes error on both points.[6] Arteaga first contends the trial court erred by imposing a concurrent term of 32 months with respect to his conviction for count 4, the gang participation charge, when the court should have stayed that sentence pursuant to section 654. He is correct.

Section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) In *People v. Mesa* (2012) 54 Cal.4th 191, 198, our high court confirmed section 654's applicability "where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' " The court identified the elements of gang participation pursuant to subdivision (a) of section 186.22 as active participation in a criminal street gang, knowledge of a pattern of criminal activity engaged in by the gang's members, and "willful promotion, furtherance, or assistance in felonious conduct by members of the gang." (*Id.* at p. 200; see *id.* at pp. 196–197.) It then held that section 654 barred multiple punishment where a defendant's conviction for the underlying "felonious conduct" is used to support a second conviction for gang participation. (*Id.* at pp. 197–198.) *Mesa* is dispositive. Here, the trial court incorrectly sentenced Arteaga to four years on count 2 (assault by means likely to produce great bodily injury) and a 32-month concurrent sentence for count 4 (the gang participation charge) based on the same

[6] We consider these two sentencing errors even though Arteaga failed to object on these grounds in the trial court, as they each resulted in an unauthorized sentence. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).)

underlying assault. On remand, the trial court must stay Arteaga's sentence on either count 2 or count 4, whichever count provides the shorter potential term of imprisonment.

Arteaga next argues the trial court impermissibly relied on the same underlying conviction when it imposed a five-year prior serious felony enhancement and a consecutive one-year prison prior enhancement. We agree. In *People v. Jones* (1993) 5 Cal.4th 1142, the Supreme Court concluded that a prior serious felony enhancement pursuant to subdivision (a) of section 667 and a prior prison term enhancement under subdivision (b) of section 667.5 cannot both be imposed if supported by the same prior offense. (*Jones*, at p. 1150.) Rather, under such circumstances, only the longer enhancement applies. (*Ibid.*) Here, Arteaga's sentence was enhanced under both provisions, based on a single 2006 conviction for assault with a deadly weapon. This error may be addressed upon remand.[7]

IV. FORFEITURE OF *DUEÑAS* CHALLENGE

We address finally an issue raised by appellants via supplemental briefing. At sentencing in this matter, the trial court imposed a mandatory minimum restitution fine of $300 (§ 1202.4) and a combined facilities assessment (§ 1465.8) and court operations assessment (Gov. Code, § 70373) of $70 on both Arteaga and Youngblood. The trial court ordered the assessments and set the restitution amounts without any express inquiry into appellants' ability to pay. Relying on the recent appellate decision in in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Arteaga and Youngblood now assert that the imposition of these fines and assessments without a hearing establishing their ability to pay was a violation of their right to due process of law.

Dueñas involved the plight of a married mother with cerebral palsy, whose family—which included two young children—was demonstrably unable to afford even basic necessities due to their poverty. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1060–

[7] Arteaga separately contends there was insufficient evidence to support the prison prior enhancement based on the so-called "washout rule" set forth in section 667.5, subdivision (b). (See *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) Should it become relevant, the trial court may address this issue at resentencing.

1161.) Dueñas's inability to pay several juvenile citations had resulted in the suspension of her driver's license, which then led to a series of misdemeanor convictions over the years for driving with a suspended license and additional court fees she was also unable to pay. (*Id.* at p. 1161.) Dueñas routinely served time in jail in lieu of paying the fines she owed, but nevertheless was sent to collections on other fees related to her court appearances. (*Ibid.*) After pleading no contest to yet another misdemeanor charge of driving with a suspended license, the trial court imposed the same statutory fine and assessments charged to Arteaga and Youngblood in these proceedings. (*Id.* at pp. 1161–1162.) Dueñas sought and was granted a hearing on her ability to pay, but the trial court determined that the assessments were mandatory and that Dueñas had not shown the " 'compelling and extraordinary reasons' " required by statute to waive her restitution fine. It rejected her due process and equal protection arguments. (*Id.* at p. 1163.)

The Court of Appeal reversed, opining that "[i]mposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1167.) Moreover, when such fees are imposed on indigent defendants, the "additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay." (*Id.* at p. 1168.) The *Dueñas* court thus concluded that due process of law requires a trial court to "conduct an ability to pay hearing and ascertain a defendant's present ability to pay" before it imposes assessments under section 1465.8 or Government Code section 70373. (*Dueñas*, at p. 1164.) The court additionally determined that the execution of any restitution fine imposed under section 1202.4 must be stayed "unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, at p. 1164.)

The extent to which *Dueñas* should apply to other defendants whose indigent circumstances are not so readily apparent remains to be seen. We need not consider appellants' *Dueñas* claim here, however, because neither appellant objected to imposition

of the fines and assessments at issue in the trial court, and they have thus forfeited the ability to challenge them before this court. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*) [*Dueñas* challenge forfeited by failure to object to the fines and assessments at sentencing]; *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to various fees imposed a sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 590–591 [appellant forfeited appellate claim challenging booking fee under Gov. Code, § 29550.2, subd. (a) where no objection was made at trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*) [rejecting argument that, since the defendant did not have the ability to pay, imposition of a restitution fine under section 1202.4 was an unauthorized sentence not subject to the forfeiture rule].)

In reaching this conclusion, we reject appellants' contention that their failure to object in the trial court should be excused in this case because, given the pre-*Dueñas* state of the law, any such objection would have been futile. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [forfeiture inapplicable where " 'the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change' "]; *People v. Welch* (1993) 5 Cal.4th 228, 237 ["[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].) Although the statutory fines and assessments here at issue were, by their terms, mandatory, there is nothing in the record at sentencing which indicates appellants were foreclosed from making the same request that Dueñas successfully made in the face of those same mandatory charges. The arguments and holdings in *Dueñas* are grounded in longstanding due process principles and precedent. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168; see *Frandsen*, *supra*, 33 Cal.App.5th at pp. 1154–1155 [noting that *Dueñas* was foreseeable and "applied law that was old, not new"].) Moreover, the *Dueñas* court, itself, noted recent decisions demonstrating a trend toward protecting indigent persons from the disproportionate effects of governmental fees. (See *Dueñas*, at pp. 1168–1169.) We cannot say *Dueñas* was unforeseeable, especially in light of its unique facts. (But see *People v. Johnson* (2019) 35 Cal.App.5th 134, 138; *People v. Castellano* (2019)

33 Cal.App.5th 485, 488–489.) Appellants could have made a record in the trial court had their ability to pay actually been an issue. (Compare *Frandsen*, at p. 1154.) They failed to do so.

Appellants also claim that failure to hold a hearing on their inability to pay was a "clear and correctable" legal error and thus should not be deemed forfeited by their failure to object. (See *Scott*, *supra*, 9 Cal.4th at p. 354 [where sentence is "unauthorized" because "it could not lawfully be imposed under any circumstance in the particular case" no objection in the trial court is required "because such error is ' "clear and correctable" ' independent of any factual issues presented by the record at sentencing"]; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 880–881 [constitutional objection to imposition of probation condition is forfeited unless it presents " 'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court' "].) Appellants essentially argue that remand is required as a matter of law whenever a trial court has imposed mandatory assessments or fines upon a defendant without a hearing. We have a different view.

A defendant's ability to pay is a quintessentially factual determination. (See *Frandsen*, *supra*, 33 Cal.App.5th at p. 1153.) Moreover, a defendant is in the best position to know whether he or she has the ability to pay any fees or fines. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749–750 ["[T]he most knowledgeable person regarding the defendant's ability to pay would be the defendant himself. It should be incumbent upon the defendant to affirmatively argue against application of the [section 290.3] fine and demonstrate why it should not be imposed."].) The burden rests with the defendant, not the People, to demonstrate his or her inability to pay the mandatory assessments and fine in question. (*Castellano*, *supra*, 33 Cal.App.5th at p. 490 [in *Dueñas* context, "a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court"]; *Frandsen*, at p. 1154 ["Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and

demonstrate why it should not be imposed."]; compare *Avila*, *supra*, 46 Cal.4th at p. 729 [pursuant to subd. (d) of § 1202.4, burden is on defendant to demonstrate inability to pay restitution fine in excess of the minimum]; see *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 180 ["Statutes . . . are presumed constitutional, and the party attacking their constitutionality therefore bears the burden of demonstrating the constitutional infirmity."].) To the extent *Dueñas* implies otherwise, we disagree with it.

Neither Arteaga nor Youngblood objected below to the various assessments and fines here at issue or sought to make an affirmative showing that imposition of $370 in court charges would impose undue hardship of a constitutional magnitude. Moreover, neither asserts such inability on appeal. Under the circumstances, we see no reason to depart from the traditional rule requiring a party to raise an issue in the trial court before seeking appellate review. We therefore decline to reach the merits of appellants' *Dueñas* claim.

V. DISPOSITION

Arteaga's case is remanded to the trial court for resentencing in accordance with this opinion. In all other respects, the convictions of both Arteaga and Youngblood are affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

_____
Banke, J.

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